No. 89-1902

In the Supreme Court of the United States

OCTOBER TERM, 1990

DENNIS E. PRYBA, BARBARA A. PRYBA, EDUCATIONAL BOOKS, INC., and JENNIFER G. WILLIAMS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) violate the First Amendment where the predicate acts of racketeering are obscenity violations and the forfeited assets consist of books, magazines, and videotapes.

2. Whether the district court was required to conduct a proportionality review to determine if the forfeiture of petitioners' property as a result of their RICO convictions was disproportionate to their crimes.

3. Whether the district court erred in excluding evidence of a public opinion survey and an "ethnographical" study that the defense offered to demonstrate community attitudes toward sexually explicit material.

4. Whether the district court erred in instructing the jury that its determination of obscenity depended on the community's acceptance, rather than its tolerance, of the material at issue.

5. Whether the district court erred in declining to instruct the jury that a RICO conspiracy charge requires proof that the defendant agreed to commit personally at least two predicate acts of racketeering.

6. Whether the district court erred in admitting against the corporate petitioner evidence of 15 previous state obscenity convictions for conduct that was charged as predicate acts of racketeering.

7. Whether the district court erred in declining to ask the prospective jurors on voir dire to identify the community organizations to which they belonged.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 900 F.2d 748.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1990. The petition for a writ of certiorari was filed on June 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners Dennis and Barbara Pryba were convicted on one count of using income derived from a pattern of racketeering to obtain an interest in an enterprise, in violation of 18 U.S.C. 1962(a) (Count 1); one count of participating in an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 2); one count of conspiring to violate Section 1962(a), in violation of 18 U.S.C. 1962(d) (Count 3); and seven counts of transporting obscene material in interstate commerce for sale and distribution, in violation of 18 U.S.C. 1465 (Counts 4-10). Petitioner Williams was convicted on all the above counts, except the Section 1962(a) count. Petitioner Educational Books was convicted on the Section 1962(a) and 1962(d) counts.

Dennis Pryba was sentenced to a total of 13 years' imprisonment, all but three years of which were suspended in favor of five years' probation. In addition, he was fined $75,000. Barbara Pryba was sentenced to suspended terms of three years' imprisonment on Counts 1, 2, and 4 through 10, and to a suspended term of ten years on Count 3. She also was sentenced to concurrent terms of three years' probation on each count and was fined $200,000. Williams was sentenced to a three-year prison term, which was ssupended in favor of three years' probation. She also was fined $2,250. Educational Books was fined $200,000.

In addition to the prison terms, probation terms, and fines, the district court entered an order, pursuant to 18 U.S.C. 1963(a), forfeiting the Prybas' illegal enterprise and all its assets, including corporate stock, real property, automobiles, furniture, fixtures, coin boxes, and bank accounts, as well as its videotape and magazine inventory.[1] The order was entered after a separate trial in which the jury found that the forfeited assets afforded the Prybas a source of influence over the charged enterprise.

1. The evidence is summarized in the opinion of the court of appeals. Pet. App. A3-A6. It showed that the Prybas owned corporations that operated nine video rental stores and three bookstores in Northern Virginia.[2] Two of the corporations, B & D Corporation and Educational Books, Inc., operated the Video Rental Center stores, which stocked inventories of general audience videotapes, sexually explicit adult

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[1] Section 1963(a) authorizes the forfeiture of

> (1) any interest the [defendant] has acquired or maintained in violation of section 1962;
>
> (2) any—
>
> (A) interest in;
>
> (B) security of;
>
> (C) claim against; or
>
> (D) property or contractual right of any kind affording a source of influence over;
>
> any enterprise which the [defendant] has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and
>
> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity * * * in violation of section 1962.

[2] Although the Prybas owned the stock in the corporations, they avoided listing themselves as officers or directors. Petitioner Williams, a long-time employee of the Prybas who performed numerous services for the corporation, including bookkeeping, was listed as president of one of the corporations.

videotapes and magazines, and "marital aids." The stores also ran "peek booths," through which one could view sexually explicit tapes. The videotapes and magazines available for sale at the Video Rental stores depicted, in graphic detail, vaginal and anal intercourse, oral sex, sadomasochistic sex, group sex, homosexual sex, and ejaculation. Some of the magazines created the appearance that the models were teen-age girls, presumably to appeal to pedophiles.

2. Petitioners appealed their convictions, raising seven issues. First, petitioners contended that the RICO forfeiture statute violates the First Amendment where the racketeering activity consists of obscenity offenses and the forfeited property consists of books, magazines, and videotapes. The court of appeals rejected that claim. The court explained that the RICO forfeiture provisions "do[] not violate the First Amendment even though certain materials, books and magazines, that are forfeited, may not be obscene and, in other circumstances, would have constitutional protection as free expression," so long as there is "a nexus established between defendants' ill gotten gains from their racketeering activities and the protected materials that were forfeited." Pet. App. A14. A contrary holding, the court noted, "would allow criminals to protect their loot by investing it in newspapers, magazines, radio and television stations." *Ibid.* The court added that RICO forfeitures have no more of a "chilling effect" on the exercise of First Amendment rights than do the substantial prison terms and fines to which the Prybas were subject for their obscenity offenses alone, without regard to the RICO counts. *Id.* at A16.

Second, petitioners argued that the forfeiture order violated the Eighth Amendment because the loss

of their property was disproportionate to the seriousness of their crimes. The court of appeals held that the Prybas "did not receive a sentence of sufficient severity to trigger a proportionality review," and that even if such a review were appropriate, the Prybas had "failed to proffer the information that would be required for such an undertaking." Pet. App. A17.

Third, petitioners argued that the district court improperly excluded evidence of a public opinion survey and an "ethnological" study that petitioners offered to demonstrate community standards with respect to sexually explicit material. The court of appeals disagreed, concluding that the jurors would not have been helped by the evidence because "the questions presented by the pollsters in conducting their surveys did not accurately and fully describe the challenged material being sold by the [petitioners]." Pet. App. A18.

Fourth, petitioners challenged the district court's refusal, when conducting voir dire, to ask the prospective jurors seven of the 117 questions that petitioners had submitted. The court of appeals concluded that the district court did not abuse its discretion in finding some of the proposed questions "overly intrusive." Pet. App. A19.

Fifth, petitioners contended that the district court erroneously admitted the corporate petitioner's 15 previous state obscenity convictions as evidence of the corporation's predicate acts of racketeering. The court of appeals rejected the claim, adopting the opinion of the district court. Pet. App. A20. The district court reasoned that excluding the convictions "would ignore settled doctrine giving preclusive ef-

fect to convictions, cause a waste of judicial time and resources, and raise the spectre of inconsistent results." *Id.* at A116.

Sixth, petitioners argued that the district court should have instructed the jury that the measure of obscenity is not community acceptance but rather community tolerance. The court of appeals concluded that such a standard would distort the test for obscenity because people often tolerate circumstances that they find disagreeable but can do nothing about. Pet. App. A22.

Finally, petitioners claimed that the district court should have instructed the jury that to convict on the RICO conspiracy count it must find that a defendant agreed to commit personally at least two predicate acts of racketeering, and not that he agreed only to the commission of the predicate acts by others. The court of appeals rejected that argument on the ground that, under general conspiracy law, "[t]he heart of a conspiracy is the agreement to do something that the law forbids. There is no requirement that each conspirator personally commit illegal acts in furtherance of the conspiracy or to accomplish its objectives." Pet. App. A24.

ARGUMENT

1. Petitioners contend (Pet. 5-20) that the forfeiture provisions of the RICO statute, 18 U.S.C. 1963(a), violate the First Amendment when the predicate acts are obscenity violations and the property forfeited consists of expressive material, such as books and magazines. The courts below properly rejected this claim. This Court has already held that obscenity violations may serve as predicate acts for a conviction under state racketeering laws. *Fort Wayne Books, Inc.* v. *Indiana*, 109 S. Ct. 916 (1989). The Court acknowledged that the prison sentence and fine authorized by the state RICO statute at issue there were more severe than those authorized for a simple obscenity offense and that, as a result, booksellers might "practice self-censorship and remove First Amendment protected materials from their shelves." *Id.* at 925. The Court observed, however, that "deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.'" *Id.* at 925-926, quoting *Smith* v. *California*, 361 U.S. 147, 154-155 (1959). Accordingly, the Court concluded that "[t]he mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional." 109 S. Ct. at 926.

The same analysis applies to the RICO forfeiture provisions at issue here. There is no First Amendment principle that prohibits Congress from imposing a forfeiture penalty for engaging in a pattern of

racketeering consisting of multiple obscenity violations. "It is not for this Court . . . to limit the [government] in resorting to various weapons in the armory of the law." *Fort Wayne Books, Inc.*, 109 S. Ct. at 925 (quoting *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 441 (1957)). A forfeiture penalty is no more "chilling" than a prison sentence or fine. Indeed, if the indictment had simply alleged obscenity offenses, the Prybas would have been subject to 35 years' imprisonment and $3,500,000 in fines. Those penalties are far more severe than the RICO forfeiture imposed here.

Furthermore, there is no merit to petitioners' argument that the forfeiture of racketeering-related assets is impermissible where the forfeited materials are books and magazines. The purpose of the RICO forfeiture provisions is to "divorc[e] guilty persons from the enterprises they have corrupted." *United States* v. *Cauble*, 706 F.2d 1322, 1350 (5th Cir. 1983), cert denied, 465 U.S. 1005 (1984). Expressive materials are subject to forfeiture "not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime." *Western Business Systems, Inc.* v. *Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980). The fact that the RICO predicate acts are obscenity violations rather than, for example, narcotics violations is irrelevant; in either instance the purpose of the forfeiture is "not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity." *4447 Corp.* v. *Goldsmith*, 504 N.E.2d 559, 565 (Ind. 1987). Indeed, if bookstores, newsstands, publishing houses and the like were immune from forfeiture, drug lords and other racketeers could invest in those

businesses and thereby insulate their criminal proceeds from seizure.[3]

2. Petitioners also contend (Pet. App. A21-A22) that the district court should have conducted a proportionality review to determine whether the forfeiture of their property constituted cruel and unusual punishment in violation of the Eighth Amendment. Although this Court has held that a criminal sentence must be proportionate to the crime for which the defendant has been convicted, *Solem* v.

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[3] Petitioners cite no case—and we are aware of none—holding that the federal government may not obtain forfeiture of expressive materials as punishment for a crime. Petitioners rely on *State* v. *Feld*, 155 Ariz. 88, 745 P.2d 146 (Ct. App. 1987), where a state court upheld the constitutionality of the State's RICO forfeiture provisions but apparently limited their application to the obscene materials themselves and to the proceeds of the sale of obscene materials or the proceeds of other racketeering activity. 155 Ariz. at 97, 745 P.2d at 155. The state court's interpretation of state law, which predated *Fort Wayne Books, Inc.*, has little bearing here. Petitioners also rely on several noncriminal decisions of this Court invalidating state action designed specifically to restrict expressive activity. *E.g.*, *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981) (use of zoning power to prohibit live nude dancing); *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (statutory bar against future exhibition by theater of films not yet found to be obscene based on past exhibition of obscene films); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963) (requests to booksellers by state commission, using threat of criminal prosecution, to remove "objectionable" publications from their shelves); *Marcus* v. *Search Warrant of Property*, 367 U.S. 717 (1961) (statutory authorization of pretrial seizure of materials on the determination by police officers that they are obscene). None of these cases can fairly be read as bringing into question the forfeiture of racketeering-related assets under the RICO statute just because those assets happen to consist of materials that, in other circumstances, would be protected by the First Amendment.

Helm, 463 U.S. 277, 290 (1983), it has made clear that "[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare" (*id.* at 289-290, quoting *Rummel* v. *Estelle*, 445 U.S. 263, 272 (1980)), and that "a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." *Solem*, 463 U.S. at 290 n.16.

The court of appeals correctly held here that a "[proportionality] analysis is not required because [petitioners] did not receive a sentence of sufficient severity to trigger a proportionality review." Pet. App. A17. As this Court has explained, "[r]eviewing courts * * * should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." *Solem*, 463, U.S. at 290. Congress has concluded that petitioners' crimes are serious. Under the penalties that Congress has set, the Prybas' predicate obscenity offenses alone could have been punished by 35 years' imprisonment and a fine of $3,500,000. The RICO forfeiture, which involves assets whose total value appears to be substantially less than the permissible fine for the predicate offenses (see Gov't C.A. Br. 36), is not disproportionate to the gravity of their crimes and falls well within the Eighth Amendment's bounds.

Petitioners contend that the court of appeals' decision conflicts with *United States* v. *Busher*, 817 F.2d 1409 (9th Cir. 1987). There, the court of appeals held that where a defendant "makes a prima facie showing that the forfeiture may be excessive, the district court must make a determination, based upon appropriate findings, that the interest ordered forfeited is not so grossly disproportionate to the

offense committed as to violate the eighth amendment." *Id.* at 1415. It is doubtful, however, that the Ninth Circuit would have found that the record in this case established a prima facie showing of excessiveness, particularly since petitioners did not even attempt to make a proffer in the district court regarding the value of their forfeited assets. As the court of appeals stated, even if a proportionality review would otherwise have been appropriate, petitioners "have failed to proffer the information that would be required for such an undertaking." Pet. App. A17.

3. Petitioners next challenge (Pet. 23-26) the district court's refusal to admit into evidence two social science studies that petitioners offered to show that their wares were not obscene. The first study consisted of a social science professor's public opinion telephone survey assessing community attitudes toward sexually explicit material. The professor asked participants whether they thought that the portrayal of "nudity and sex" in materials available only to adults had become more or less acceptable in recent years, and whether adults should be able to obtain and view materials depicting nudity and sex. Pet. App. A99. The second study consisted of a sociologist's "ethnographical" survey. The sociologist visited various book and video stores in the community that sold "adult" magazines and videotapes, talked to the customers and operators of the stores about sexually explicit materials, and consulted newspaper editors about letters they received regarding sexually explicit material. The district court did not abuse its "wide discretion" in excluding these studies.

See *Hamling* v. *United States*, 418 U.S. 87, 108 (1974).

First, as the district court explained, the telephone survey was "not designed to elicit information about whether there was community acceptance of the actual materials in question or similar materials." Pet. App. A98. Rather, it was designed to elicit information about "the general political question whether adults should be able legally to obtain pornography." *Ibid.* The opinions of the survey's respondents about whether the viewing of nudity and sex in the abstract has become more acceptable or whether adults should be able to obtain material depicting nudity and sex are not, as the district court concluded, "relevant to the question whether depictions such as those at issue are actually accepted in the community." *Id.* at A99. Asking a person in a telephone interview whether he is offended by depictions of sex and nudity is, in the words of the court of appeals, a "far cry" from asking him about the graphic sexual representations contained in the material in question. *Id.* at A18. See *United States* v. *Various Articles of Merchandise*, 750 F.2d 596, 599 (7th Cir. 1984) (surveys, to be admissible, "must address material clearly akin to the material in dispute").[4]

[4] Moreover, even if the survey was marginally relevant, the district court correctly ruled, under Fed. R. Evid. 403, that the probative value of the evidence was substantially outweighed by the danger that it would confuse the jury by diverting its attention to the political question whether obscene material should be protected. Pet. App. A103. The state cases on which petitioners rely do not help them. In *People* v. *Nelson*, 88 Ill. App. 3d 196, 410 N.E.2d 476 (App. Ct. 1980), and *Saliba* v. *State*, 475 N.E.2d 1181 (Ind. Ct. App. 1985), the survey did not merely ask the participants whether sexually explicit material had become more acceptable in the community in recent years, but also asked whether they personally thought it acceptable for an adult to view such material. 88 Ill. App. 3d at 200, 410 N.E.2d at 480; 475 N.E.2d at 1191. The opinion in *Carlock* v. *State*, 609 S.W.2d 787 (Tex. Crim. 1980), the third case cited by petitioners, does not indicate what questions the survey asked. Furthermore, none of these state cases described the sexually explicit material at issue. In this case, the words "nudity and sex" do not begin to convey the graphic nature of the material found to be obscene.

Similarly the district court did not err in excluding the sociologist's testimony concerning his "ethnographical" study. First, the sociologist was not qualified as an expert on contemporary standards of obscenity in Northern Virginia. Pet. App. A107-A111. His study consisted of little more than a one-man, eight-day series of interviews with dealers and customers of sexually explicit material, and with the editors of various local newspapers about letters they had received concerning pornography. As the district court concluded, "[t]o permit this so-called 'study' to masquerade as expert testimony on Northern Virginia's contemporary community standards of obscenity is ludicrous." *Id.* at A111.[5]

[5] In addition, the study was based on only those sexually explicit materials found in the stores that he visited—stores that had been chosen with the assistance of a Pryba employee. The sociologist did not show the films or magazines here at issue to his interviewees and, as the district court noted, there was no evidence that the two groups of material were comparable. Pet. App. A108-A109. The district court also properly ruled that the sociologist's testimony was inadmissible under Rule 403 because "being clothed in the guise of expert testimony, [it] would have diverted the jury's attention from the issue of community acceptance of the charged materials to the issue of community acceptance of noncomparable materials." *Id.* at A112. Petitioners argue that there is con-

4. In instructing the jury concerning the "contemporary community standards" test of *Miller* v. *California*, 413 U.S. 15 (1973), the district court stated that "[c]ontemporary community standards are set by what is, in fact, accepted in the adult community as a whole, and not by what the community merely tolerates." Pet. App. A21. Petitioners contend (Pet. 26-27) that this instruction is incorrect because the legal measure for obscenity under *Miller* depends not on what the community accepts, but rather on what it tolerates. This claim is without merit.

This Court has sometimes used the words "tolerance" and "toleration" when discussing the *Miller* test. See *New York* v. *Ferber*, 458 U.S. 747, 761 n.12 (1982); *Smith* v. *United States*, 431 U.S. 291, 295 (1977). But the Court has never stated that the standard for obscenity is what the community will "endure" or "put up with." As the court of appeals observed, "[t]o consider community toleration as synonymous with what a community will put up with skews the test of obscenity and invites one to consider deviations from community standards, because a community can be said to put up with a

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fusion among the federal and state courts concerning the standard for admissibility of comparable material evidence. The courts agree, however, that in order to be admissible such evidence must at the very least be similar to the evidence alleged to be obscene. *E.g.*, *United States* v. *Pinkus*, 579 F.2d 1174, 1175 (9th Cir.), cert. denied, 439 U.S. 999 (1978); *United States* v. *Womack*, 509 F.2d 368, 377 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975). Here, the district court found that the tapes and magazines that the sociologist examined were either noncomparable or not shown to be comparable. Pet. App. A109. That factual finding does not warrant this Court's review.

number of disagreeable circumstances that it cannot stop." Pet. App. A22. See also *Hoover* v. *Byrd*, 801 F.2d 740, 741-742 (5th Cir. 1986) (substituting "tolerance" for decency "affronts the notion of 'standards', because tolerance embodies the permissible *deviations* from standards.").

Petitioners' argument reduces to the contention that, since some sexually explicit materials are available in the community, the community necessarily tolerates those materials, and therefore that those materials are not legally obscene under *Miller*. This Court, however, effectively rejected that approach in *Hamling* v. *United States*, *supra*, where it held that "the availability of similar materials on the newsstands of the community does not automatically make them admissible as tending to prove the non-obscenity of the materials which the defendant is charged with circulating." 418 U.S. at 125. See also *United States* v. *Manarite*, 448 F.2d 583, 594 (2d Cir.) ("Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance."), cert. denied, 404 U.S. 947 (1971). Indeed, in *United States* v. *Battista*, 646 F.2d 237, 245, cert. denied, 454 U.S. 1046 (1981), the Sixth Circuit held outright that community acceptance rather than tolerance is the correct measure of obscenity under *Miller*. Accord *Sedelbauer* v. *State*, 428 N.E.2d 206, 210-211 (Ind. 1981), cert. denied, 455 U.S. 1035 (1982). Petitioners cite no authority to the contrary.

5. The district court instructed the jury that, in order to convict on the RICO conspiracy count, it must find that "each defendant agreed to personally

commit or aid and abet two or more acts of racketeering in violation of Section 1962(a), or that each defendant agreed that another co-conspirator would commit two or more acts of racketeering in violation of [Section] 1962(a)." Gov't C.A. Br. 58. Petitioners contend (Pet. 27-28) that the court's charge was erroneous because it allowed the jury to convict even if it failed to find that a defendant agreed to commit personally at least two predicate acts.

The crime of conspiracy typically requires proof of an agreement whose objective is the commission of one or more unlawful acts. *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). There is no requirement that each conspirator agree that he will himself perform the illegal acts that constitute the conspiracy's objectives. On the contrary, a conspirator may be convicted upon a showing that he "agree[d] to participate in the conspiracy with knowledge of the essential objectives of the conspiracy." *United States* v. *Carter*, 721 F.2d 1514, 1528 n.21 (11th Cir.), cert. denied, 469 U.S. 819 (1984). See *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947) (law requires only "showing sufficiently the essential nature of the plan and [the conspirator's] connections with it").

In light of these basic principles of conspiracy law, the court of appeals properly held that the RICO conspiracy statute should be construed simply to require an agreement to participate in an enterprise, understanding and agreeing that the enterprise's affairs will be conducted through the commission of at least two criminal acts. There is no evidence that Congress, in enacting the conspiracy provision of the RICO statute, intended to depart from the general principles of conspiracy law. Indeed, far from imposing the additional restrictions on the prosecution that petitioners urge, Congress mandated that the RICO statute be liberally construed to effectuate its purpose. A requirement that each RICO conspirator agree to commit personally the requisite predicate acts would undermine the congressional objective of combatting organized crime because it would have the effect of exempting from the coverage of the conspiracy provision those organized crime figures shrewd enough to insulate themselves from particular criminal acts committed by their colleagues. See *United States* v. *Neapolitan*, 791 F.2d 489, 497-498 (7th Cir.), cert. denied, 479 U.S. 940 (1986).

As petitioners point out, two circuits have stated that a RICO defendant must agree to participate in the conduct of the enterprise through his own commission of the predicate acts. *United States* v. *Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984). Those two early decisions, however, have been rejected by every other court of appeals that has subsequently ruled on the issue. See *United States* v. *Leisure*, 844 F.2d 1347, 1367 (8th Cir.), cert. denied, 488 U.S. 932 (1988); *United States* v. *Rosenthal*, 793 F.2d 1214, 1228 (11th Cir. 1986); *United States* v. *Neapolitan*, 791 F.2d at 492-498; *United States* v. *Joseph*, 781 F.2d 549, 554-555 (6th Cir. 1986), cert. denied, 480 U.S. 919 (1987); *United States* v. *Adams*, 759 F.2d 1099, 1116 (3d Cir.), cert. denied, 474 U.S. 971 (1985); *United States* v. *Tille*, 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845 (1984).

Although the First Circuit case, *Winter*, contains language contrary to the majority rule, the issue

petitioners raise here was not presented in that case. The jury in *Winter* was instructed that conviction required an agreement to commit two predicate acts personally. The defendants argued on appeal that a RICO conspiracy requires more—proof that the defendant actually committed two predicate acts of racketeering. The First Circuit rejected that argument. The court's statement that a RICO conspiracy requires an agreement to commit two or more predicate acts personally is therefore dictum. The court had no occasion to consider the sufficiency of an agreement that co-conspirators commit the predicate acts. See 663 F.2d at 1135-1136.

Unlike the First Circuit in *Winter*, the Second Circuit in *Ruggiero* reversed a conviction for RICO conspiracy, but the court's analysis of the RICO conspiracy issue was not necessary to its decision. The issue of the proper construction of Section 1962(d) arose in connection with the appeal of defendant Tomasulo. The indictment charged Tomasulo with participating in a RICO conspiracy based on two predicate acts. The court concluded on appeal that one of the two predicate acts did not qualify as an act of racketeering at all. For that reason, the court concluded that Tomasulo's conviction was invalid without regard to whether he had agreed to commit that act himself or had simply agreed that the act would be committed by one of his co-conspirators. In either case, the agreement that he was alleged to have entered included only one valid act of racketeering and, accordingly, was not a violation of Section 1962(d). See 726 F.2d at 921.

In any event, the *Ruggiero* and *Winter* courts did not have the benefit of the other court of appeals decisions that have adopted what has become the majority rule. Indeed, the *Ruggiero* court stated that

it considered its construction of Section 1962(d) to be required by "prevailing case law." 726 F.2d at 921. Since that time, every circuit to consider the issue has ruled contrary to *Ruggiero* and *Winter*. Because of this more recent case law, the First and Second Circuits might well reconsider their decisions when presented with an opportunity to do so.[6]

6. Petitioners contend (Pet. 29) that the district court improperly admitted evidence of the corporate petitioner's 15 previous state obscenity convictions for conduct that was charged in the RICO counts as predicate acts of racketeering. They rely on the dual sovereignty doctrine, which holds that the Double Jeopardy Clause does not bar successive prosecutions by separate sovereigns, such as the federal government and a state government, for offenses arising from the same criminal act. See *Heath* v. *Alabama*, 474 U.S. 82 (1985); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). Petitioners reason that since a defendant cannot invoke a previous state acquittal to bar a federal prosecution for the same offense, the government should not be permitted to introduce previous state court convictions in order to prove RICO predicate acts.

There is no legal basis for the rule of parallelism for which petitioners contend. The reason that a

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[6] This Court repeatedly has denied certiorari in cases raising this same issue. See *Wougamon* v. *United States*, cert. denied, 488 U.S. 960 (1988); *Finestone* v. *United States*, cert. denied, 484 U.S. 948 (1987); *Stewart* v. *United States*, cert. denied, 480 U.S. 919 (1987); *Messino* v. *United States*, cert. denied, 479 U.S. 939 (1986); *Neapolitan* v. *United States*, cert. denied, 479 U.S. 940 (1986); *Adams* v. *United States*, cert. denied, 474 U.S. 971 (1985); *Tillie* v. *United States*, cert. denied, 469 U.S. 845 (1984); *Morris* v. *United States*, cert. denied, 469 U.S. 819 (1984).

state court acquittal does not bar a later federal prosecution for the same criminal act is that such a bar would interfere with the sovereign power of the federal government to punish transgressions of its laws, just as a bar to a state prosecution because of an earlier federal acquittal would interfere with the inherent sovereignty of the particular State. See *Heath*, 474 U.S. at 88-89. By contrast, permitting one sovereign to use a previous conviction by another sovereign to prove a violation of its own laws does not interfere with the inherent power of either. Accordingly, the dual sovereignty doctrine provides no basis for excluding evidence of the 15 state convictions in the federal prosecution.

7. During voir dire, the defense requested the district court to ask the prospective jurors to identify the community organizations to which they belonged. Although the court did ask most of the 117 questions submitted by the defense, many with subparts (Pet. App. A19), it declined to ask that question, explaining that it would not have "50 jurors stand up and give me their *curriculum vitae* on what organizations they're a member of." Gov't C.A. Br. 49. Petitioners contend (Pet. 30) that the district court abused its discretion in refusing to ask that question.

In *Smith* v. *United States*, 431 U.S. 291 (1977), on which petitioners rely, the Court did not suggest that it is necessary to ask prospective jurors in obscenity cases to list every community organization to which they belong. Rather, the Court stated that it "might be helpful" during voir dire to ascertain "with what organizations having an interest in the regulation of obscenity the juror has been affiliated." *Id.* at 308. The Court emphasized that the "propriety of a particular question is a decision for the trial court to make in the first instance." *Ibid.* Although the district court did not ask the question that the defense requested, it did ask the prospective jurors whether "you or any member of your family [are] members of any organization that has as its objective or purpose or as one of its objectives or purposes the promotion or the suppression of pornography or allegedly obscene material." Gov't C.A. Br. 50. That is precisely the question suggested by *Smith*. In light of the question that the district court did ask, it plainly did not abuse its discretion in declining to ask the question submitted by petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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